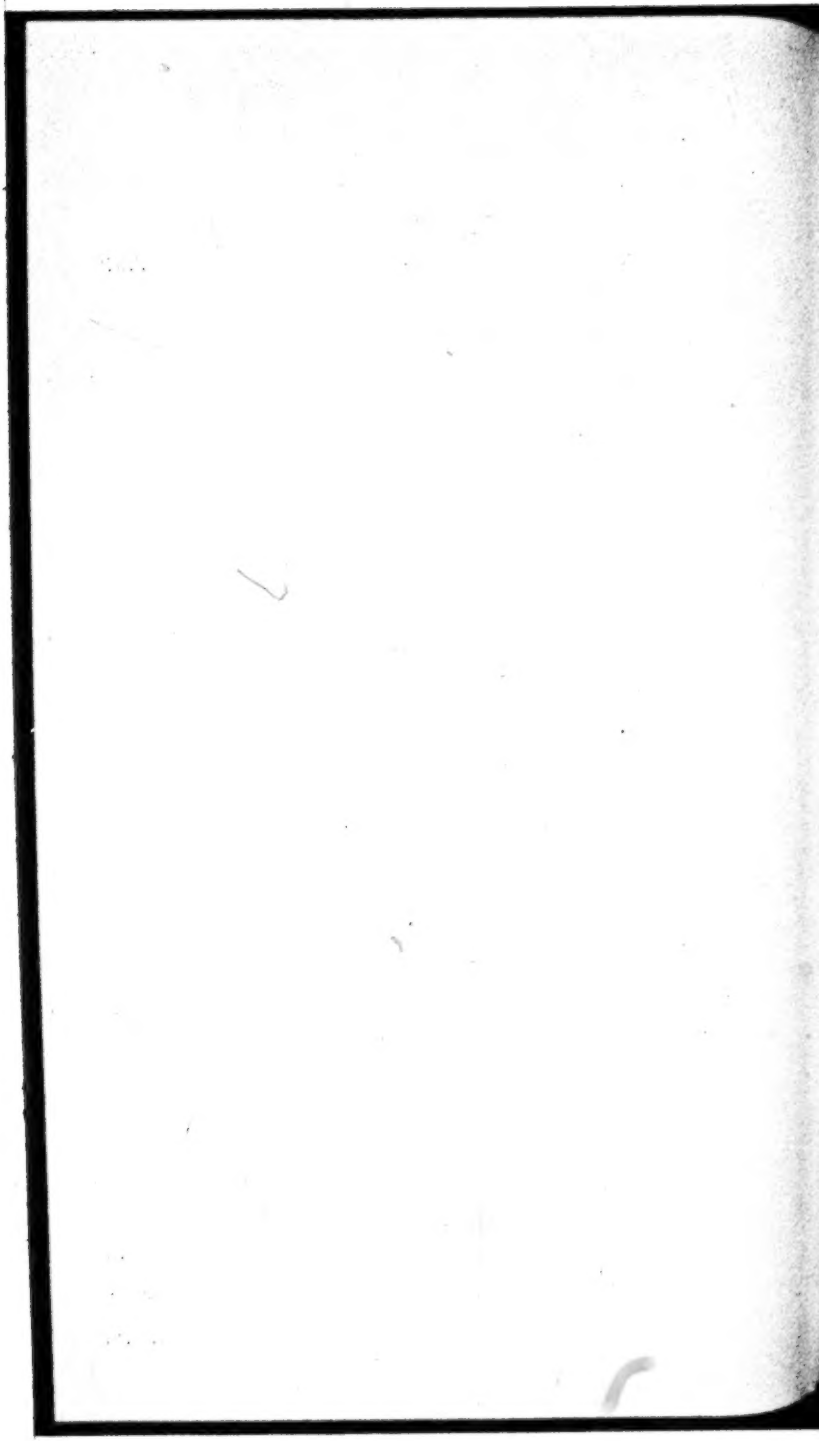

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-5581

RICHARD GUY STEFFEL,

Petitioner,

vs.

JOHN R. THOMPSON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS HUDGENS AND REYNOLDS

QUESTION PRESENTED

Whether the federal courts below properly declined to issue a declaration of rights as to the constitutionality of the threatened good faith application of an admittedly valid state criminal trespass statute.

STATEMENT OF THE CASE

The relevant facts are not in dispute and are correctly summarized in petitioner's statement of the case (pp. 3-8) and the decision of the court of appeals (A. 44-46). Only a few highlights, therefore, require restatement.

On October 8, 1970, petitioner and others sought to distribute anti-war handbills on the private property of respondent Hudgens'

shopping center.[1] When asked by Center security personnel to cease such activities, pursuant to a long standing and uniformly enforced Center policy prohibiting handbilling,[2] the handbillers refused to do so. Police were subsequently summoned and threatened the handbillers with arrest under the Georgia criminal trespass law, Ga. Code § 26-1503, if they did not stop handbilling. The handbillers then departed only to return and recommence their handbilling two days later. Again, after a refusal to desist upon the request of Center security personnel, police were called and arrests threatened. Steffel thereupon ceased handbilling but another member of the group, Becker, did not and was arrested. This action was instituted within the week in

1. The Center, consisting principally of a large parking area and a totally covered air-conditioned mall building containing approximately sixty tenant stores, is located in a partially residential, partially small business area of unincorporated DeKalb County, Georgia. A. 44. The Center is privately owned and maintained, with entrance to the public permitted only during business hours and then only pursuant to Center rules as enforced by the Center's own security personnel (A. 19-20), with a substantial, continuing investment having been made in order to provide an attractive place for customers to shop without interference or irritation. A. 44-45. The Center is significantly smaller than the Lloyd Center involved in *Lloyd Corporation Ltd.* v. *Tanner*, 407 U. S. 551 (1972), and, in further contrast to that center, does not contain any public streets and sidewalks (cf. 407 U. S. at 553) nor permit, as discussed in the following footnote, even a limited use of its mall by civic and charitable organizations (cf. 407 U. S. at 555).

2. Since the Center's inception in 1965, its rule against handbilling, solicitation and related activities of a non-promotional nature has been enforced without discrimination. The only exception has been that the Boy Scouts and local garden clubs have been permitted to use unrented mall booths for certain limited public relations purposes. A. 44-45. Hudgens, in fact, has been engaged in extensive litigation which is presently again before the National Labor Relations Board on remand from the Fifth Circuit as the result of the Center's exclusion of union pickets from its premises. (*Scott Hudgens*, 192 NLRB No. 11 (1971), *rem'd*, ... F. 2d ..... (5th Cir. 1971)) and is also now seeking a declaration of rights as to that question, as well as the similar prohibition of Steffel, in the Georgia state courts. *Scott Hudgens* v. *Local 315, R. W. D. S. U., et al.*, Case No. B-81424, Fulton City, Ga. Superior Ct., brought under the Georgia Declaratory Judgment Act, Ga. Code § 110-1101, *et seq.*

federal district court, seeking declaratory and injunctive relief, to attack the constitutionality of the Georgia criminal trespass law as applied to Steffel and Becker's handbilling. A. 5-12. Following the decisions in *Younger* v. *Harris*, 401 U. S. 37 (1971), and *Samuels* v. *Mackell*, 401 U. S. 66 (1971), the District Court denied the requested relief. A. 36-41. An appeal was taken only with respect to the refusal to grant a declaration of rights to Steffel, and a panel of the Court of Appeals for the Fifth Circuit unanimously affirmed. A. 44-55. This decision was affirmed again by a 12-3 majority of the full Court of Appeals on a petition for rehearing *en banc*. A. 56-60.

SUMMARY OF ARGUMENT

The petitioner argues that the courts below applied an erroneous standard for determining the propriety of granting federal declaratory relief concerning threatened state criminal prosecution; that the bad faith harassment test of *Younger-Samuels* is inapplicable in such a case. The crux of the petitioner's contentions is that, in the absence of a *pending* state prosecution, even if there is a *threatened* prosecution, the controlling criterion is the more expansive test applied prior to *Younger-Samuels*, i.e., that based on *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), and *Zwickler* v. *Koota*, 389 U. S. 241 (1969). There are several salient defects in this argument:

First, this Court has long recognized that federal interference with a state's good faith administration of its criminal laws is basically inimical to our federal system. Constitutional defenses to state criminal statutes, accordingly, are required to be raised in state proceedings, subject to ultimate review by this Court. Nonetheless, prior to *Younger-Samuels*, federal equitable intervention was presumed permissible to enjoin or declare unconstitutional state laws, either facially invalid or enforced in bad faith, regardless of whether a state proceeding was threatened or pending. Petitioner, however, as Judge Tuttle noted in his

concurring opinion below (A. 50-5), does not meet either criterion. There is no assertion in this case that the Georgia criminal trespass statute is facially defective. Nor is there any claim that state authorities have exercised bad faith in the enforcement of that statute or engaged in other forms of harassment. Thus, even if *Younger-Samuels* is found inapplicable or to be merely a restatement of *Dombrowski-Zwickler*, nevertheless, as this Court concluded in the factually indistinguishable situation present in *Cameron* v. *Johnson*, 390 U. S. 11 (1968), the decision below should be affirmed.

Second, *Younger* held that federal injunctions against either threatened or pending state proceedings should be sanctioned only where the state remedy is patently inadequate and there is a need to prevent great and immediate irreparable injury. *Samuels* applied the "same equitable principles" (401 U. S. at 73) to the grant of federal declaratory relief where there is a pending state proceeding. The present controversy—declaratory relief sought with respect to a threatened state proceeding—would also result, as the court below concluded, in a similar impermissible disruption of state criminal processes. The instant dispute must be differentiated from those cases, such as *Roe* v. *Wade*, 93 S. Ct. 705 (1973), and *Lake Carriers Association* v. *MacMullen*, 406 U. S. 498 (1972), which involved no immediate threat of prosecution. There, federal intervention offended neither principles of comity nor equity. Here, however, in contrast to those instances, and like the *Samuels* pending prosecution situation, Steffel has acted. There has already been a commitment on the part of state law enforcement officials. The petitioner has chosen his tribunal—the state courts—and should utilize that forum for vindication of his constitutional rights.

Finally, contrary to petitioner's assertion (brief, pp. 27-32), this case does not raise a substantial question as to the merits of the underlying constitutional controversy. That issue has been squarely resolved by this Court, subsequent to the commencement of this action, by *Lloyd Corporation, Ltd.* v. *Tanner*,

407 U. S. 551 (1972). No legitimate "chilling effect" on petitioner's constitutional rights, therefore, now exists. There is also a pending state criminal proceeding against Becker and a pending state declaratory judgment action, involving both Steffel and Hudgens (see fn. 2, *supra*), in both or either of which the issues sought to be decided here may be resolved. This case, in short, is hardly the "classic case for declaratory relief" asserted by petitioner (brief, p. 26).

ARGUMENT

I. Petitioner Has Failed to State a Proper Claim for Declaratory Relief Even Under the Pre Younger-Samuels Standard

Prior to *Younger-Samuels*, there was no automatic right to a federal declaratory judgment construing a state criminal statute. To the contrary, prevailing "considerations of federalism," then, as now, "tempered this exercise of equitable power" and "recognized that federal interference with a State's good faith administration of its criminal laws is peculiarly inconsistent with our federal framework." *Dombrowski*, 380 U. S. at 484. Federal equitable relief, whether injunctive or a declaration of rights,[3] was permissible only where state statutes were either "justifiably

3. There are, of course, as *Zwickler* recognized, different considerations for declaratory and injunctive relief requiring that "a request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against the enforcement of that statute." 389 U. S. at 254. This distinction does not suggest, however, that the *Dombrowski* standard for enjoining a threatened state prosecution was inapplicable where, as in *Zwickler*, a declaration of rights was sought in such a case. Nowhere in *Zwickler*, for example, is there any implication that, in the absence of either bad faith harassment or facial invalidity, a declaratory judgment would still be in order. Conversely, the discussion of the absention doctrine in both *Dombrowski* (380 U. S. at 489-492) and *Zwickler* (389 U. S. at 254-255) specifically limits the inapplicability of that doctrine to only those instances where "statutes are justifiably attacked on their face as abridging free expression, or as applied for purposes of discouraging protected activities." *Dombrowski*, 380 U. S. at 489-490. After all, as *Samuels* subsequently recognized, ordinarily "the practical effects of the two forms of relief will be virtually identical . . ." 401 U. S. at 73.

attacked on their face as abridging free expression" (*Zwickler*, 389 U. S. at 254; *Dombrowski*, 380 U. S. at 489-490) or invoked by state officials "in bad faith to impose continuing harassment in order to discourage appellants' activities . . ." *Dombrowski*, 380 U. S. at 490. Where these prerequisites were absent—where, for example, as in *Cameron*, there was no facial invalidity or bad faith harassment (390 U. S. at 615-17, 619)—*both* federal injunctive and declaratory remedies were unavailable. Significantly, although both *Dombrowski* and *Zwickler* involved threatened, as contrasted with pending, state proceedings, neither decision drew any such distinction. Nor did *Cameron*, where there were both pending and threatened prosecutions. The same standard, whether that applicable to injunctions or to declaratory judgments, was thus assumed dispositive whether a prosecution was pending or merely threatened. See, to the same effect, *Great Lakes Co.* v. *Huffman*, 319 U. S. 293 (1943);[4] *Fenner* v. *Boykin*, 271 U. S. 240 (1926); *Douglas* v. *City of Jeannette*, 319 U. S. 157, 163 (1943); and fn. 5, *infra*.

The petitioner errs, in short, in asserting that the pre *Younger-Samuels* law, if applied in this case, would require a declaration of rights. Steffel has not shown either that the Georgia criminal trespass statute is facially invalid or is likely to be enforced in bad faith. Neither of these prerequisites for a declaratory judgment, whether *Younger-Samuels* or *Dombrowski-Zwickler* is controlling, have thus been met. The instant case, accordingly, as Judge Tuttle, who significantly otherwise disagreed with the panel majority and concurred in the views expressed by Mr. Justice Brennan in *Perez* (A. 52-55), concluded, "seems to fall directly under . . . *Cameron* . . . we do not need to extend

4. *Great Lakes* admittedly involved "the unique considerations presented by anticipatory tax litigation." *Perez*, 401 U. S. at 127 (Brennan, J., concurring). Nevertheless, the rationale of that case—the likelihood of interference with state proceedings—is similarly present here. Cf. *Samuels*, 401 U. S. at 69-73; *Boyle* v. *Landry*, 401 U. S. 77, 81 (1971).

Younger." A. 52.[5] This reasoning, it is submitted, is eminently correct and, on this ground alone, the decision below should be affirmed.

II. The Younger-Samuels Standard Was Correctly Applied by the Court of Appeals

Petitioner (brief, p. 20) acknowledges that *Younger* curtailed the availability of injunctive relief against a threatened, as well as a pending, state proceeding. See also the decision below (A. 46-48); *Younger*, 401 U. S. at 45; *Boyle* v. *Landry*, 401 U. S. 77 (1971); and Comment, *The Supreme Court, 1970 Term*. 85 Harv. L. Rev. 301, 304-5 (1971). Steffel's quarrel with the decisions below is their extension of this reasoning to declaratory judgments. This argument disregards the critical distinction between the instant case, where there is an imminent threat of state prosecution triggered by the petitioner's own willful and repeated conduct, and those situations where there is no such likelihood of a state determination.

Roe v. *Wade* and *Doe* v. *Bolton*, 93 S. Ct. 739 (1973), two of the cases primarily relied upon by the petitioner (brief, pp. 23-24), are illustrative of this difference. There several potential

5. Petitioner admits that "relief was properly denied" in *Cameron* "where the petitioners failed to show the existence of a facially vague or overbroad statute and where the evidence at the hearing did not show irreparable injury or bad faith enforcement." Pet. brief, p. 36. Petitioner seeks to distinguish *Cameron* from this case, however, on the ground that the Court there was not concerned with declaratory relief sought "against threatened state criminal proceedings." *Ibid.* This contention is specious. *First*, as demonstrated above, there was no difference, under the *Dombrowski-Zwickler* rule applied in *Cameron*, between the declaratory judgment standard to be applied with respect to threatened, as contrasted to pending, state prosecutions. The same prerequisites were required in each instance. Nowhere in *Cameron*, for example, is there even the slightest suggestion that the Court would have reached a contrary result if here had been only threatened prosecutions. *Second*, insofar as the criminal statute in *Cameron* was "selectively enforced" and not all pickets prosecuted (see 390 U. S. at 620-21), that case, in fact, involved *both* threatened and pending state proceedings.

plaintiffs sought to attack various state anti-abortion laws. A physician, Dr. Hallford, who had been charged with a violation of the state statute and was awaiting prosecution, was held to lack standing since there was no allegation of harassment and bad faith in the state proceeding. *Roe*, 93 S. Ct. at 713. Other potential litigants, who alleged only a speculative future application of the state law, were also held not to be appropriate plaintiffs. *Id.* at 714. The plaintiffs, accordingly, were restricted to pregnant women (Jane Roe and Mary Doe) and physicians, who, while neither presently being prosecuted nor threatened with prosecution, had asserted a direct threat of personal detriment. *Id.* at 712-713; *Doe*, 93 S. Ct. at 745. See, to the same effect, *Lake Carriers Association* v. *MacMullen*, 406 U. S. 498 (1972), where, like Jane Roe and Mary Doe, the plaintiff, although not subject to "an immediate threat of prosecution," nevertheless possessed a claim "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." 406 U. S. at 506, 509; see also the decision below on rehearing (A. 56-7). The present plaintiff—who has twice defied state law, triggered threats of arrests and caused the commitment of state law enforcement authorities—is more akin to Dr. Hallford than Jane Roe and Mary Doe. He too has an adequate opportunity to vindicate his constitutional claims in state court; there is no question in Steffel's case, in contrast to that of the legitimate plaintiffs in *Roe* and *Doe*, that the state will act should there be a continuation of his challenged course of conduct. The state court, in the instant case, is, therefore, the appropriate forum in which to adjudicate petitioner's constitutional defenses.

Federal interference with state criminal processes, as Mr. Justice Frankfurter once observed, is "perhaps the most sensitive source of friction between States and Nation." *Stefanelli* v. *Minard*, 342 U. S. 117 (1951). State trespass laws, in particular, involve matters that are "historically a concern of state law" and "conduct that touches interests 'deeply rooted in local feeling and responsibility.'" *Taggart* v. *Weinacker's*, 397 U. S. 223, 227-228 (1970) (Burger, C. J., concurring). Federal declara-

tory relief in this case would freeze, as evident by the indefinite continuance of Becker's prosecution (A. 46, n. 2), the administration of the Georgia criminal trespass law. Petitioner, moreover, has already repeatedly and willfully acted in defiance of that law; and the state law enforcement authorities are already committed to proceed in good faith thereunder against Steffel consistent with their prosecution of Becker. The comity and equity principles which prompted *Younger-Samuels*, accordingly, in contrast to *Roe, Doe* and *Lake Carriers*, are fully applicable here. Petitioner's failure to meet the *Younger-Samuels* standard was properly held to preclude declaratory relief.[6]

III. There Is No Substantial Question as to the Merits of the Underlying Constitutional Controversy

Petitioner alleges (brief, p. 26) that the instant dispute presents "a classic case for declaratory relief." The precise contrary conclusion, in fact, is that required. A declaration of rights in this case is both unnecessary and duplicative of state remedies.

A. Steffel's constitutional claim in this case rests upon asserted rights arising under *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U. S. 308 (1968), and *Marsh* v. *Alabama*, 326 U. S. 501 (1946). A. 46. Those decisions, however, subsequently have been expressly held to be inapplicable in the situation *sub judice*. In *Lloyd Corporation, Ltd.* v.

6. The various appellate court decisions relied upon by petitioner (brief, p. 25, n. 19) are not to the contrary. In *Wulp* v. *Corcoran*, 454 F. 2d 826 (1st Cir. 1972), the plaintiffs contended both that prior-licensing ordinance and that the threatened prosecution by the city officials constituted bad faith harassment. Similarly, in *Lewis* v. *Kugler*, 446 F. 2d 1343 (3rd Cir. 1971), the plaintiffs alleged a pattern of bad faith harassment by New Jersey police consisting of repeated unconstitutional searches and seizures without arrest or prosecution. And in *Crossen* v. *Breckenridge*, 446 F. 2d 833 (6th Cir. 1971), there was a claim that the Kentucky anti-abortion law was facially invalid under the Ninth Amendment.

Tanner, 407 U. S. 501 (1972), decided with *Central Hardware Co.* v. *N. L. R. B.*, 407 U. S. 539 (1972), this Court upheld the right of a private shopping center, far larger and more public than the Center in this case, to prohibit handbilling unrelated to the center's operations. Fifth Amendment property rights were required to yield to First Amendment free speech rights only where (1) the private property has assumed "to some significant degree the functional attributes of public property devoted to public use" (*Central Hardware*, 407 U. S. at 547); (2) no "adequate alternative avenues of communication exist" (*Lloyd*, 407 U. S. at 567); and (3) there is a "relationship . . . between the purpose of the expressive activity and the business of the shopping center" (*Lloyd*, 407 U. S. at 564).[7]

None of these three requirements have been met in this case. Petitioner's purported distinction (brief, pp. 27-9) between this case and *Lloyd*, that in this case the Center precluded handbilling on private exterior sidewalks whereas in *Lloyd* the prohibition was directed against such activities on the walkways of a partially enclosed private mall, is specious. Regardless of where on private Center property Steffel previously engaged in or now desires to engage in handbilling, since the Center is not the functional equivalent of public property, and there are ample effective alternative public areas for the communication of his unrelated message, it "would be an unwarranted infringement of [Hudgens] property rights to require them to yield under [such] circumstances . . ." *Lloyd*, 407 U. S. at 567. This is the clear

7. *Police Department* v. *Mosley*, 408 U. S. 92 (1972), in no way "clearly undermine[s]," as petitioner suggests (brief, p. 28), *Lloyd*. *Mosley*, decided only *four* days after *Lloyd*, does not even mention that decision. The reason is that *Mosley* involved a totally inapposite issue: the reconciliation of the need to permit the free expression of ideas *in public places*. *Lloyd* and the instant case, however, are concerned with a different question: namely, to what extent must a *private property* owner make available his property for public use. See *Diamond* v. *Bland*, ... Cal. App. 2d .... (July 10, 1973).

teaching of *Lloyd*.[8] There is no substantial question presented here by simply seeking a reiteration of that lesson.

B. Petitioner also claims (brief, pp. 29-30) that the only state remedy available to him requires arrest and a criminal trial; that there is no Georgia declaratory judgment proceeding whereby he can obtain vindication of his constitutional rights. Hudgens, in fact, has initiated precisely such an action (see fn. 2, *supra*) which, in its opinion, is well-founded in Georgia law. Cf., e.g., *Harper* v. *Burgess*, 225 Ga. 420, 422 (1969); *Jenkins* v. *Manry*, 216 Ga. 539, 540 (1961); *Calvary Indep. Baptist Church* v. *Rome*, 208 Ga. 312 (1957); *Stein Printing Company* v. *Atlanta Typographical Union Local 48*, Civil Action Nos. B-66457 and 67125, Fulton Cty, Ga., Superior Ct. (1972). A state declaration of Steffel's rights is, therefore, not only possible but likely. There is no need in this case to invoke the spectre of either a "breach of the peace" or "self-help." Pet. brief, pp. 30-2.

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8. Petitioner erroneously asserts (brief, p. 34) that the threatened enforcement of the Georgia criminal trespass law "deprives petitioner of a desirable location, otherwise available to the public at large, at which he may engage in First Amendment activity." As previously noted (fn. 2, *supra*), however, the Center's prohibition against handbilling is enforced uniformly and without discrimination. The Center is simply not available for any member of the public who desires to engage in non-commercial First Amendment activities thereon; here, as in *Lloyd*, the Center has extended an invitation to the public only to come onto the Center to do business with the tenant stores. "There is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interest of both the stores and the shoppers whom they serve." *Lloyd*, 407 U. S. at 565.

CONCLUSION

For the reasons described above, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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